THE FORGOTTEN CHILDREN: SAME-SEX PARTNERS, THEIR CHILDREN AND UNEQUAL TREATMENT

Abstract: Many of today's family relationships no longer fit within the traditional one-mother, one-father model. Families created by gay and lesbian couples are on the increase and the issues relating to the legal protections of these families remain uncertain. Many state courts and legislatures have refused to legally recognize, through second-parent adoptions, the relationship of children born to a homosexual couple with their non-biological second parent. The refusal to permit second-parent adoptions denies the children of homosexual couples, as a class, many of the legal benefits and protections afforded to children of heterosexual couples. This Note argues that such classifications of children born to same-sex couples punish children for the actions of their parents and thus results in unfair treatment violative of the Equal Protection Clause.

INTRODUCTION

Courts cannot continue to pretend that there is one formula, one correct pattern, that constitutes a family.[1] Families today are comprised of many different participants including sperm donors, egg donors, gestational parents, adoptive parents, extended family and children.[2] As a result, courts and legislatures must face the challenge of modifying the traditional definitions of family to accommodate new family arrangements.[3]

With the advance of reproductive technology and anonymous sperm donations, homosexual couples now are able to participate in

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[1] As one court recently noted: "[s]ocial fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that can not be solved by idealizing the past. Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source." Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993); *see also* Adoption of a Child by J.M.G., 632 A.2d 550, 554–55 (N.J. Super. Ct. Ch. Div. 1993).

[2] *See* Karen Markey, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat The Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS., 721, 722 (1998).

[3] *Compare* Adoption of Tammy, 619 N.E.2d 315, 315–17 (Mass. 1993) *and* Adoptions of *B.L.V.B. and E.L.V.B.*, 628 A.2d at 1272, *with* Angel Lace M. v. Terry M., 516 N.W.2d 678, 683 (Wis. 1994).

the conception of children.[4] Families in which two homosexual partners are raising children often encounter legal obstacles because many courts are reluctant to structure legal families reflecting this reality.[5] In families with same-sex parents, each partner may seek legal recognition as a parent of the children they raise and care for.[6] In an attempt to attain such acknowledgment, many couples in same-sex relationships petition for second-parent adoptions.[7] "Second-parent adoption" refers to the legal action taken by one partner in order to adopt the children (biological or adoptive) of the other partner, as might a stepmother or stepfather in a heterosexual family.[8] Often, the adopting parent is equally responsible for the decision to bring the child into the world and for the rearing of the child, and therefore seeks the benefits and legal protections that arise from such a parent-child relationship.[9] When second-parent adoptions are permitted, the parent-child relationship with the "second" parent is recognized while the parental rights of the biological or primary adoptive parent remain intact.[10]

Families with homosexual parents seeking adoption encounter legal obstacles because state adoption statutes do not expressly permit adoption by same-sex partners.[11] Most adoption statutes require the biological parents to terminate their legal rights to the child in order for another person to adopt their child, unless the adopting party is the legal spouse of an existing parent.[12] Currently, no state in the

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[4] *See Adoption of B.L.V.B.*, 628 A.2d at 1272; *see also* Markey, *supra* note 2, at 722.

[5] *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 545–47, 573 (1990).

[6] *See Adoption of B.L.V.B.*, 628 A.2d at 1272; *see also Adoption of Tammy*, 619 N.E.2d at 315–16.

[7] *See* Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 255, 256–257 (1998).

[8] *See* 1996 LAMBDA LEGAL DEFENSE AND EDUCATION FUND, *Adoption by Lesbian and Gay Men: An Overview of the Law in the 50 States*, (visited Nov. 11, 1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=111.html [hereinafter *Lambda Overview of the Law*].

[9] *See Adoption of B.L.V.B.*, 628 A.2d at 1272.

[10] *See* Sonja Larsen, Annotation, *Adoptions of Child by Same-Sex Partners*, 27 A.L.R.5th 54 (1995).

[11] *See Lambda Overview of the Law*, *supra* note 8, at 2.

[12] *See* Markey, *supra* note 2, at 746. This exemption is termed the "step-parent exception." *See id.* As no state permits legal marriage for homosexual couples, lesbian and gay couples do not fit within a step-parent exception and thus many states require the natural parents to terminate their legal rights to the child in order for their partner to adopt the child. *See id.*

United States permits same-sex couples to legally marry which prevents same-sex partners from adopting their partners' children under the spousal exception.[13] Furthermore, in a small number of states, same-sex partners encounter adoption statutes which expressly prohibit adoption by homosexuals.[14]

When same-sex couples do petition for second-parent adoption, they often encounter the court's subjective determination of whether such an arrangement is suitable for the child.[15] The majority of states apply the same standard of review for adoptions: the "best interests of the child standard."[16] While courts refuse to allow second-parent adoptions allegedly based on concern for the child's welfare, such a decision is often colored by legal and social biases.[17] As a result of the courts' and legislatures' unwillingness to acknowledge second-parent adoptions, many children are left without the protections of a legal relationship with their non-biological or non-adoptive second parent.[18]

This Note asserts that a court's refusal to permit second-parent adoptions denies the children of homosexual parents, as a class, many of the benefits and protections that children of heterosexual parents are accorded. The Note further argues that such refusal violates the rights of children of same-sex parents under the Equal Protection Clause.[19] Part I reviews the rights and benefits given to children with legally recognized heterosexual parents and examines the treatment of second-parent adoption petitions by different courts.[20] Part II outlines the Equal Protection Clause and the U.S. Supreme Court's decisions denouncing unequal treatment of innocent children who are born illegitimately.[21] Part III demonstrates that children are denied essential rights and benefits when both of their homosexual parents

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[13] *See id.*

[14] *See* FLA. STAT. ANN. § 63.042(3) (West 1985); MISS. CODE ANN. § 93–17–3 (2000); UTAH CODE ANN. §§ 78–30–1, 9 (2000); Lydia A. Nayo, *In Nobody's Best Interests: A Consideration of Absolute Bans on Sexual Minority Adoption from the Perspective of the Unadopted Child*, 35 U. LOUISVILLE J. FAM. L. 25, 28 (1996).

[15] *See* William E. Adams, Jr., *Whose Family is it Anyway? The Continuing Struggles for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 583 (1996).

[16] *See Lambda Overview of the Law*, *supra* note 8, at 2; Polikoff, *supra* note 5, at 542.

[17] *See generally* Polikoff, *supra* note 5, at 547–61.

[18] *See Adoption of Tammy*, 619 N.E.2d at 317, 320; Danielle Epstein & Lena Mukherjee, Note, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J. LEGAL COMMENT 782, 809–11 (1997).

[19] *See infra* notes 187-261 and accompanying text.

[20] *See infra* notes 26-127 and accompanying text.

[21] *See infra* notes 128-176 and accompanying text.

are not legally recognized.[22] Part IV proposes that classifications affecting children of homosexual parents should be subject to an intermediate level of judicial scrutiny.[23] Part V further argues that under an intermediate scrutiny, a court should find that the rights and protections denied to these children based on the status of their birth violates the Equal Protection Clause.[24] Finally, Part VI examines a new state law affecting families of same-sex partners and argues that second parent adoptions are still essential to ensure the security of the relationship between a child and both parents.[25]

I. Background

A. *Benefits Conferred to Children with Legally Recognized Parents*

Children who have two legally recognized parents are accorded many rights and benefits.[26] In most states, a child typically has a legally recognized mother and father—even if the child's parents are not married.[27] For example, a woman who bears a child with her same genetic make-up is the biological or natural mother of the child and typically is deemed to be the child's legal mother.[28] The legal father of a child, however, may be determined by several circumstances.[29] In many states, there is a longstanding presumption—sometimes irrebutable—that a child born to a married woman is the legal offspring of the mother's husband.[30] If the child is born to an unwed mother, state statutes provide mechanisms for a child to be legitimated subsequent to the child's birth, either by voluntary legitimization by the father or

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[22] *See infra* notes 177-186 and accompanying text.

[23] *See infra* notes 187-199 and accompanying text.

[24] *See infra* notes 200-252 and accompanying text.

[25] *See infra* notes 253-261 and accompanying text.

[26] *See* Robert H. Mnookin & D. Kelly Weisberg, Child, Family and State, Problems and Materials on Children and the Law 241 (3d ed. 1995).

[27] *See id.* at 754; *see also* Uniform Parentage Act 9A U.L.A. 171 (1983 Supp.).

[28] *See* Uniform Parentage Act 9A U.L.A. 171 (1983 Supp.). An exception to this is the contractual arrangement with surrogate mothers who may agree to terminate parental rights to another family that usually includes the biological father andsperm donor. *See* Uniform Status of Children of Assisted Conception Act (USCACA), 9B U.L.A. 135 (Supp. 1993) *See generally* In re Baby M, 537 A.2d 1227, 1234–36 (N.J. 1988).

[29] *See* Mnookin & Weisberg, *supra* note 26, at 239–243.

[30] *See id.* at 239. In some states this presumption is irrebutable. *See* Michael H. v. Gerald D., 491 U.S. 110, 117–18 (1989). In other states the presumption is rebuttable by clear and convincing evidence to the contrary. *See, e.g.*, Mass. Gen. Laws Ann. ch. 209C, §6(a)(1) (West 1987 & Supp. 1993); *see also* Uniform Parentage Act 9A U.L.A. 171 § 4 (Supp.).

paternity proceedings brought by the mother or the state.[31] A child conceived by artificial insemination of anonymous sperm, however, typically does not have any legal rights with respect to the biological "father" because most state laws provide that an anonymous semen donor will not legally be deemed the child's legal father.[32]

Children born to either married or unmarried heterosexual parents are entitled to certain financial benefits by virtue of their being the natural offspring of their legal parents.[33] For example, every state has statutes requiring both the mother and father to contribute to the support and maintenance of their children.[34] Children who are born to married parents have inheritance rights to both parents' estates.[35] If a child's unmarried mother dies without a will, the child is accorded inheritance rights to their mother's estate.[36] Today, a substantial number of states also provide illegitimate children with intestate rights to the estates of fathers who have recognized the child during their lifetime.[37]

Furthermore, in addition to support and inheritance rights, children with legally acknowledged parents have many benefits recognized at law and available to them in the event of a parent's death.[38] Such benefits include: payments from a parent's pension; contributions from a governmental program such as Social Security; or royalties under a federal statute such as the Copyright Act.[39] Children of a deceased parent also may recover for the wrongful death of their parent under some state's wrongful death statutes.[40] Children with legally recognized parental relationships also are eligible for worker's compensation benefits and insurance coverage under a parent's employer-provided health insurance.[41]

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[31] *See* MNOOKIN & WEISBERG, *supra* note 26, at 240, 242.

[32] *See* Barbara K. Padgett, Note, *Illegitimate Children Conceived By Artificial Insemination: Does Some State Legislation Deny Them Equal Protection Under the Fourteenth Amendment?*, 32 U. LOUISVILLE J. FAM. L. 511, 522 (1994).

[33] *See* MNOOKIN & WEISBERG, *supra* note 26, at 238–42, 301.

[34] *See* Gomez v. Perez, 409 U.S. 535, 583 (1973); MNOOKIN & WEISBERG, *supra* note 26, at 241.

[35] *See* Trimble v. Gordon, 430 U.S. 762, 774, 776 (1977); MNOOKIN & WEISBERG, *supra* note 26, at 301.

[36] *See* MNOOKIN & WEISBERG, *supra* note 26, at 241.

[37] *See id.* at 241–42, 301.

[38] *See* Glennon, *supra* note 7, at 258–59.

[39] *See id.*; MNOOKIN & WEISBERG, *supra* note 26, at 244.

[40] See Levy v. Louisiana, 391 U.S. 68, 69, 72 (1968) (denying illegitimate children access to wrongful death claim for death of a parent is unconstitutional under the Equal Protection Clause).

[41] *See* Glennon, *supra* note 7, at 259.

In addition to these numerous financial securities, a legal parent-child relationship provides security, both personal and emotional, to a child.[42] If a child has two legally recognized parents and one parent dies, courts typically give the other legal parent[43] custody to care for the child.[44] By being placed with the other parent, the child may be sheltered from upheaval after the loss of a loved one.[45] If the parents separate, both parents have standing to be considered for custody and visitation, and are able to maintain the parent-child relationship.[46] Finally, legal parents are eligible for extended leave from employment to care for seriously ill children under the Federal Family and Medical Leave Act.[47]

B. *The Leading State Court to Uphold Second-Parent Adoptions and Further Progress*

Only within the last decade have courts begun to acknowledge that second-parent adoptions may promote the best interests of children.[48] Courts have generally defined the best interests standard as promoting the welfare of the child with regard to health, safety, and physical and emotional well-being.[49] A number of states now recognize that protection of parent-child relationships, regardless of the formation, may be the best way to safeguard these interests.[50] Further, in a momentous legal move, one state now legally recognizes same-sex couples, which allows children to have two legal parents in a legally recognized union—and all of the protections and benefits that come with such recognition.[51]

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[42] *See id.*

[43] Courts sometimes may also give grandparents legal custody in the event of one parent's death. *See* MNOOKIN, *supra* note 26, at 842–43.

[44] *See generally* Polikoff, *supra* note 5, at 527.

[45] *See id.* at 532, 533.

[46] *See id.* at 534, 537.

[47] *See* 29 U.S.C.A. § 2601 (West Supp. 1997); *see also* Glennon, *supra* note 7, at 258–59.

[48] *See* Adoption of Tammy, 619 N.E.2d 315, 318, 320–21 (Mass. 1993); *In re* Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1273 (Vt. 1993).

[49] *See, e.g., In re* Opinion of the Justices, 530 A.2d 21, 23, 24 (N.H. 1987); *Adoptions of B.L.V.B*, 628 A.2d at 1273; Polikoff, *supra* note 5, at 542–44. Courts, however, differ on whether the best interests standard applies to the adoption process or to the legal effects of the adoption. *See In re* Adoption of Jane Doe, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998); Adoption of Child by J.M.G., 632 A.2d 550, 552 (N.J. Super. Ct. Ch. Div. 1993).

[50] *See* 2000 Vt. Acts & Resolves 91 (H.847).

[51] *See id.*

In June 1993, in *In re Adoptions of B.L.V.B. and E.L.V.B.*, Vermont became the first state to legalize second-parent adoptions.[52] In *Adoptions of B.L.V.B.*, two women in a committed, monogamous relationship decided to have and raise children together and agreed that one partner would be impregnated with the sperm of an anonymous donor.[53] Both women equally fulfilled the role of parent. After the birth of a second child, the couple felt that it was important that the nonbiological mother secure legal recognition of her continuing relationship with their children.[54] The women faced a barrier, however, because under the Vermont adoption statute, natural parents were required to terminate all legal parental rights in order for their child to be adopted, unless a spouse of the natural parent sought the adoption.[55]

In addressing the intent of the adoption statute, the Vermont Supreme Court stated that the primary concern was to promote the welfare of children, and not to require that both parents seeking adoption be married.[56] The court noted that when the state legislature enacted the statute, they doubtfully contemplated the possibility of adoptions by same-sex partners.[57] Reasoning, however, that a child who has two adults dedicated to his welfare and security and determined to raise him together to the very best of their ability is a favorable situation, the court held that continuation and recognition of the rights of both the natural and adoptive parent were compelled by the best interest of the child.[58] Thus, the court upheld the second-parent adoption.[59]

The state of Vermont recently provided same-sex couples and their children further legal protection through the passage of the Act Relating to Civil Unions.[60] This legislation creates a new relationship status for same-sex couples, "civil unions," and extends virtually all the state-sponsored protections, responsibilities, and benefits afforded through civil marriage.[61]

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[52] 628 A.2d at 1276.

[53] *See id.* at 1272.

[54] *See id.*

[55] *See* VT. STAT. ANN. tit. 15, §§ 431, 448 (1945); *Adoptions of B.L.V.B.*, 628 A.2d at 1272–73.

[56] *See Adoptions of B.L.V.B.*, 628 A.2d at 1273, 1274.

[57] *See id.* at 1274.

[58] *See id.* at 1275.

[59] *See id.* at 1275–76.

[60] *See* 2000 Vt. Acts & Resolves 91 (H. 847).

[61] *See* VT. STAT. ANN. tit. 15, §§ 1201, 1202, 1204 (2000).

The civil union legislation developed as a result of the 1999 Vermont Supreme Court ruling *Baker v. State*.[62] Relying on the Equal Protection Clause, the court in *Baker* held that same-sex couples can no longer be denied full and equal protections, benefits and responsibilities under the law as a result of their sexual orientation.[63] Although the court retained jurisdiction, it left it to the legislature to determine how to comply with its ruling.[64] After days of extensive hearings and debates, the House and Senate enacted the new civil union law and the governor signed the act into law on April 26, 2000.[65]

As a result of the new civil union relationship status, same-sex couples will have fewer obstacles when it comes to raising their children.[66] Legal rights that apply to married couples will automatically apply to spouses of a civil union.[67] A child born to one partner during a civil union will be recognized as a child of both partners in the union.[68] These children, therefore, will be entitled to the health benefits of both parents, as well as automatic inheritance rights, and rights to parental support.[69] Likewise, both parents in a civil union will have medical decision-making power for their children, the right to leave work to care for their sick child, hospital visitation rights, and parenting decision and custody rights.[70] While the civil union law does apply to both private parties as well as public entities within the state of Vermont, the law does not apply to federal law and it is unsettled whether the federal government or other states will recognize the unions.[71]

C. Other State Court Decisions Following Vermont's Lead in Permiting Second Parent Adoptions

Applying reasoning similar to that of the Vermont Supreme Court in *B.L.V.B.*, the Massachusetts Supreme Judicial Court, in September 1993, permitted same-sex partners to jointly adopt their

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[62] *See* 744 A.2d 864 (Vt. 1999).

[63] *Id.* at 867.

[64] *See id.* at 886–89.

[65] *See* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, *A Historic Victory: Civil Unions for Same-Sex Couples—What's Next!* (visited Aug. 23, 2000) <http://www/lambdalegal.org/cgi-bin/ pages/documents/record?record=659> [hereinafter *A Historic Victory*].

[66] *See id.* at 3–4.

[67] *See* VT. STAT. ANN. tit. 15, § 1204 (2000).

[68] *See id.*

[69] *See id.*

[70] *See A Historic Victory*, *supra* note 65, at 3–4.

[71] *See id.* at 2, 3–5.

child.[72] In *Adoption of Tammy*, two women in a committed lesbian relationship participated jointly and equally in the parenting of a child born to one partner.[73] Together, the women sought adoption of their child.[74] In evaluating what was in the child's best interests, the court noted that adoption by the non-natural mother was financially important to the child.[75] Recognizing both women as the parents, the court found that the child would receive many benefits, including the right to inherit her non-biological mother's irrevocable family trust, to legally receive support from both parents and to be eligible for both parents' social security and health insurance benefits.[76] The court also recognized the importance of the child's preserving her filial ties with both parents in case of death or separation.[77] The court reasoned that the adoption would be in the best interests of the child because of the benefits flowing from legal recognition and the importance of preserving for the child a stable and loving environment for the child.[78] Thus, although the Massachusetts adoption statute did not expressly permit the adoption without terminating the natural parent's rights, the court nonetheless permitted the legal recognition of both mothers.[79]

Although second-parent adoptions have not been approved by many of the states' highest courts, many lower courts have begun to follow Vermont's and Massachusetts' lead by recognizing that second-parent adoptions may be in the child's best financial and emotional interest.[80] In *In re Adoption of a Child by J.M.G.*, a 1993 New Jersey case of first impression, the Superior Court permitted a second-parent adoption by a lesbian partner, based on the child's best interests.[81] The child's biological mother and her lesbian partner were in a

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[72] *See* Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993).

[73] *See id.* at 315–16.

[74] *See id.* at 315.

[75] *See id.* at 317, 320.

[76] *See id.* at 320.

[77] *See* Adoption of Tammy, 619 N.E.2d at 320.

[78] *See id.*

[79] *See id.* at 321.

[80] *See, e.g.*, Adoption of a Child by J.M.G., 632 A.2d 550, 552, 554–55 (N.J. Super. Ct. Ch. Div. 1993); Adoption of a Child Whose First Name is Evan, 583 N.Y.S.2d 997, 998, 1000, 1002 (N.Y. Surr. Ct. 1992). The state courts that have permitted second-parent adoptions usually only in the lower courts, include: Alabama, Alaska, California, The District of Columbia, Connecticut, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont and Washington. *See Lambda Overview of the Law*, *supra* note 8, at 2–3, 8–11.

[81] *See* 632 A.2d 550, 554–55 (N.J. Super. Ct. Ch. Div. 1993).

committed relationship for ten years and planned to have a child together.[82] The women agreed that one partner would give birth to a child by artificial insemination from an anonymous sperm donor and that both women would raise the child as co-equal parents.[83] The court appointed a guardian ad litem for the child and an independent child investigative organization to determine what was in the best interests of the child.[84] These court appointees found that the child had a strong psychological child-parent relationship with the non-biological mother and that both women provided the child with "a secure environment in which to grow and develop."[85]

The court, relying on these reports, reasoned that formal adoption would not change the child's daily life, but would provide her with critical legal rights and protections relating to her financial, physical and emotional security.[86] The New Jersey adoption statute, however, only permitted the adoption of a child, without terminating the biological parent's rights, in the context of stepparent adoptions.[87] The court nevertheless found that the public policy of New Jersey is to protect the best interests of children and not to impose rigid constructions of the term "family."[88] Finding that the adoption was in the child's best interests—by according legal benefits and having both parents legally responsible for the child's well-being—the court permitted the second-parent adoption petition.[89]

D. *State Court Decisions and Legislative Enactments Denying Recognition of Second-Parent Adoptions*

While Vermont, Massachusetts and several other state courts have made strides to permit second-parent adoptions, many other states have either expressly forbidden adoption by homosexuals in their adoption statutes or have interpreted strictly adoption statutes to pro-

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[82] *See id.* at 551.

[83] *See id.*

[84] *See id.*

[85] *See id.* at 551, 554.

[86] *See Adoption by J.M.G*, 632 A.2d at 551–52. The court noted that the economic security provided for the child by legal recognition of both mothers would include the right to support, the right to inherit by intestacy, and eligibility for health insurance and social security benefits. *See id.* at 552. Furthermore, the adoption would protect the child's continuity of her relation with her non-biological mother if the biological mother passed away or if the couple separated. *See id.*

[87] *See* N.J. STAT. ANN. § 9:3–50(a) (West 1992).

[88] *See Adoption by J.M.G*, 632 A.2d at 552 n.1, 555.

[89] *See id.* at 555.

hibit second-parent adoptions.[90] In 1994, in *Angel Lace M. v. Terry M.*, the Wisconsin Supreme Court interpreted the state's adoption statute as prohibiting adoption by a same-sex partner unless the natural parent terminated her parental rights.[91] In *Angel Lace*, a lesbian woman sought to adopt the child of her partner without the mother losing her parental rights.[92] The court strictly construed the adoption statute limiting the ability to adopt without terminating the biological parent's legal ties to adoptions by a "husband or wife" of the parent of the minor.[93] The court found that the lesbian parent was not a "husband or wife" of the biological parent and therefore could not adopt so long as the natural mother's parental rights remained intact.[94] The court acknowledged (and did not reject) the trial court's findings that the best interest of the child would be to allow the lesbian partner—who had shared equally in raising the child—to adopt the child.[95] Nonetheless, the court focused on the fact that the partner seeking adoption was not married to the child's biological parent.[96] The court reasoned that while the consideration of the child's best interest was important, the state adoption statute's goal was to protect the "traditional unitary family."[97] Thus, because the adoptive parent did not fit neatly within the adoption statute's stepparent exception, the court found that the lesbian mother would not be permitted to seek adoption unless the natural mother terminated her rights to the child.[98]

While many state courts have strictly interpreted adoption statutes to prohibit second-parent adoptions, in 1977 the Florida legislature took a dramatic step by *expressly* barring homosexuals from adopting children.[99] In *Cox v. Florida Dept. of Health and Rehabilitative Services*, the Florida Supreme Court, in 1995, upheld the adoption statute explicitly prohibiting any homosexual from adopting.[100] In

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[90] *See* Angel Lace M. v. Terry M., 516 N.W.2d 678, 683, 684–85 (Wis. 1994); *see also* Cox v. Florida Dep't of Health and Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995) (Cox I); *Lambda Overview of the Law*, *supra* note 8, at 2–4, 8–11.

[91] *See* 516 N.W.2d at 683.

[92] *See id.* at 680–81.

[93] *See id.* at 682.

[94] *See id.*

[95] *See id.* at 684–85.

[96] *See Angel Lace*, 516 N.W.2d at 682, 683.

[97] *See id.* at 685, 686.

[98] *See id.* at 686.

[99] *See* FLA. STAT. ANN. § 63.042(3) (West 1985) (stating, "No person eligible to adopt under this statute may adopt if that person is a homosexual.").

[100] *See* Cox v. Department of Health and Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995) (*Cox II*).

Cox, two gay men seeking to adopt a special needs child applied for pre-adoption classes but were denied admission because of their admitted homosexuality.[101] The men challenged the constitutionality of the 1977 statute,[102] filing suit on equal protection, due process and privacy rights grounds as guaranteed by the Florida and United States Constitutions.[103] The court upheld the absolute ban against homosexual adoption, reasoning that such an arrangement can not be in the child's best interest.[104] The court observed that the purpose of the Florida adoption statute is to protect and promote the well-being of adopted children.[105] The court first found that there was no reliable evidence showing that adoptions by homosexuals was not detrimental to the child, and went on to reject an argument that adoption by homosexual adults may promote the welfare of the child.[106]

Reasoning that the statute furthered the best interests of children, the Florida Supreme Court adopted the District Court's findings that the statute was constitutional.[107] The District Court found that the statute did not violate an individual's right to privacy, and that the statute did not require inquiry into an applicant's private life.[108] Rather, the court found the statute prohibited adoption by those whom the state knows to be homosexual.[109] The court further reasoned that the state has a right to examine the background of prospective parents because the goal of adoption statutes is to serve the best interests of children, and thus the decision to adopt is not a private choice.[110]

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[101] *See id.* at 902–03.

[102] *See id.*

[103] *See id.* at 903.

[104] *See* Department of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1213, 1220 (Fla. Dist. Ct. App. 1993) (*Cox I*), *aff'd in part by* Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995) (Cox II); *see generally* Adams, *supra* note 15, at 603–20.

[105] *See Cox I*, 627 So. 2d at 1220.

[106] *See id.* at 1220.

[107] *See Cox II*, 656 So. 2d at 903.

[108] *See Cox I*, 627 So. 2d at 1216.

[109] *See id.* at 1220. The court did not specify how the state would discover the homosexuality of adoptive parents, but did not need to address this issue because the applicants in *Cox* voluntarily disclosed their homosexuality. *See id.* at 1211, 1215–17.

[110] *See id.* at 1216. The Florida Supreme Court further found that the opportunity to adopt an unrelated child is not a fundamental liberty interest and thus the prospective parents were not deprived of "liberty" without due process of law. *Id.* The court also rejected an equal protection argument, concluding that rational basis review was the proper standard and that the presumption of constitutionality was not overcome. *See Cox I*, 627 So. 2d. at 1216, *aff'd in part by Cox II*, 656 So. 2d at 903. The Florida Supreme Court did not

Only recently, the state of New Hampshire repealed a similar ban prohibiting homosexuals from adopting.[111] In 1987, the Supreme Court of New Hampshire upheld the constitutionality of the New Hampshire adoption statute prohibiting homosexuals from adopting any person, in *In re Opinion of the Justices*.[112] At the request of the legislature, the court reviewed the constitutionality of a bill prohibiting homosexuals from adopting and establishing an irrebutable presumption that homosexuals were unfit to be adoptive parents.[113] Under an equal protection analysis, the court found that homosexuals were not a suspect class and that adoption was not a fundamental right, and thus so long as the statute was rationally related to a legitimate governmental interest, it would be upheld.[114] The court found such a rational relation by reasoning that the state's legitimate interest was to promote children's welfare, to provide proper role models for children and to eliminate social and psychological complexities that living in a homosexual environment could produce.[115] The court reasoned that children, whether consciously or unconsciously, pattern themselves after their parents and "given the possibility of environmental influences, [the court] believe[d] that the legislature can rationally act on the theory that a [homosexual] role model can influence the child's developing sexual identity."[116] The court thus found the suggested statute did not violate the Equal Protection rights of homosexual adoption petitioners.[117]

In 1999, the New Hampshire legislature repealed its ban on homosexual adoption.[118] New Hampshire's governor acknowledged that the previous ban was replete with stereotypes and that families should

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approve the District Court's holding that homosexuals are not afforded any protection under strict scrutiny or rational basis analysis of the equal protection clause. *See Cox II*, 656 So. 2d at 903. Additionally, the court did not affirm the lower court's reasoning on the equal protection issue –that the best interests of adopted children is to be raised by adoptive parents who can provide a stable, heterosexual environment during formative pubescent and teenage years. *See id.*

[111] *See* N.H. REV. STAT. ANN. §170-B:4 (1999). From 1987 until the 1999 amendments, the adoption statute specifically listed homosexuals as individuals not eligible to adopt. *See id.*

[112] *See* 530 A.2d 21, 22, 26 (N.H. 1987).

[113] *See id.* at 23.

[114] *See id.* at 24.

[115] *See id.* at 23, 24.

[116] *Id.* at 25.

[117] *See In re Opinion of the Justices*, 530 A.2d at 26.

[118] *See* N.H. REV. STAT. ANN. § 170-B:4 (1999).

be recognized based on fitness, not "prejudicial assumptions."[119] The court's reasoning, that barring homosexuals from adopting promotes the child's welfare, is now undermined by the subsequent legislative actions.

Soon after New Hampshire's repeal of its ban, however, two other states enacted laws that effectively bar adoptions by homosexuals.[120] In March 2000, the Utah state legislature enacted a law that denies adoptions to all unmarried cohabitants.[121] The law defines "living together" as being in a sexual relationship.[122] The legislative findings state that it is not in a child's best interest to be adopted by persons who are cohabitating in a relationship that is not a legally binding and valid marriage under the laws of the state.[123] Utah law prohibits same-sex couples from marrying and thus the new adoption law effectively precludes homosexual couples who live together from adopting.[124]

The Mississippi legislature similarly passed a law prohibiting gay couples from adopting children.[125] The law, which became effective July 1, 2000, explicitly states, "adoption by couples of the same gender is prohibited."[126] Supporters of the law stated that the bill was prompted by the recognition of civil unions in Vermont and a belief that family values do not coincide with homosexual relations as an appropriate lifestyle.[127]

II. Equal Protection Analysis and Application to Illegitimate Children

A. *A Brief Overview of Equal Protection Analysis*

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution limits governmental discrimination by classification of people, and requires that no state shall "deny to any

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[119] *See N.H. Law Repeals Ban on Gay Adoptions*, Boston Globe, May 4, 1999, at B5 (quoting Governor Jeanne Shaheen).

[120] *See* Miss. Code Ann. § 93–17–3 (2000); Utah Code Ann. § 78–30–1, 9 (2000).

[121] *See* Utah Code Ann. § 78–30–1 (2000).

[122] *See* Utah Code Ann. § 78–30–1(3)(b) (2000).

[123] *See* Utah Code Ann. § 78–30–9 (2000).

[124] *See* Dennis Romboy, *Adoption Measure Faces Uphill Battle*, Desert News (Utah), Mar. 2, 2000, at A12.

[125] *See* Gina Holland, *Mississippi Legislature Passes Ban on Adoptions by Gay Couples*, Baton Rouge Advocate, Apr. 21, 2000, at 7B.

[126] *See id.*

[127] *See id.*

person within its jurisdiction the equal protection of the laws."[128] The clause has been interpreted to require the government to treat each individual with equal regard.[129] Thus, equal protection demands that courts scrutinize and possibly invalidate disadvantageous legislative and administrative classifications which reflect a preference based on prejudice.[130]

In evaluating an equal protection challenge, courts employ a tiered analysis of scrutiny, depending upon the nature of the classification involved.[131] Courts will apply strict judicial scrutiny to any governmental action that involves the classification of a suspect class or the potential impairment of a fundamental right.[132] Under this strict scrutiny, a court will not uphold the classification unless it is necessary to promote a compelling state interest.[133] In addition, the state must prove that the classification was narrowly tailored to address the compelling state interest.[134] If the classification from governmental action is not based on suspect criteria or if it does not impair a fundamental right, the courts apply the rational basis test—a lower standard of judicial review.[135] Under rational basis scrutiny, courts uphold the classification so long as the classification is rationally related to a constitutionally permissible state interest.[136]

The Supreme Court recently has begun to employ a third level of judicial scrutiny that falls between the two aforementioned extremes: intermediate judicial scrutiny.[137] Intermediate scrutiny involves a more exacting examination than the rational basis test, yet it is less rigorous than strict scrutiny.[138] Under intermediate scrutiny, classifications must serve important governmental interests and must be substantially related to achievement of those objectives.[139]

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[128] *See* U.S. CONST. amend. XIV, § 1; Plyler v. Doe, 457 U.S. 202, 210 (1981).

[129] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (2d ed. 1988).

[130] *See id.* at 1438–39; *see also* Adarand Constr., Inc. v. Pena, 515 U.S. 200, 235, (1995); Clark v. Jeter, 486 U.S. 456, 461 (1988).

[131] *See Clark*, 486 U.S. at 461; City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985).

[132] *See Clark*, 486 U.S. at 461; *Adarand*, 515 U.S. at 216.

[133] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 9–11 (1967). Classifications based on race or nationality are inherently suspect and subject to strict judicial scrutiny. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

[134] *See Plyler*, 457 U.S. at 224.

[135] *See Clark*, 486 U.S. at 461; *Plyler*, 457 U.S. at 216.

[136] *See* TRIBE, *supra* note 129, at 1440. Such classifications are presumed valid and must be wholly arbitrary to be invalid. *See id.*

[137] *See Clark*, 486 U.S. at 461.

[138] *See id.*

[139] *See id.*

B. *United States Supreme Court Decisions Addressing Classifications of Illegitimate Children*

Legislative or administrative classifications based on legitimacy or gender have been found by the United States Supreme Court to be quasi-suspect and thus subject to intermediate judicial scrutiny.[140] Thus, although illegitimacy may not be labeled a "suspect" classification, the Court exercises a heightened, intermediate scrutiny in most cases involving classifications of illegitimate children and accordingly strikes down many illegitimacy classifications.[141] The Court employs this closer scrutiny because the denial of rights to children based on the status of their birth is unjust.[142]

In 1968, in *Levy v. Louisiana*, the United States Supreme Court struck down a law that denied illegitimate children the right to recover a wrongful death claim for a parent, while permitting legitimate children a wrongful death cause of action.[143] The Court found the law constituted invidious discrimination against illegitimate children and was therefore unconstitutional.[144] In *Levy*, five illegitimate children sued to recover, under a Louisiana wrongful death statute, for the loss of their mother, but were denied the right to recover because the statute applied only to legitimate children.[145] The children challenged the statute under the Equal Protection Clause of the Fourteenth Amendment.[146] The Supreme Court held that illegitimate children are "clearly 'persons'" within the meaning of the Equal Protection Clause of the Fourteenth Amendment, and that an illegitimate child should not be denied equal rights merely because of his birth out of wedlock.[147]

While the Court in *Levy* purported to apply a rationality test,[148] in reality the Court exercised a higher level of scrutiny–intermediate scrutiny–and was not simply deferential to the legislature's interest.[149]

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[140] *See Clark*, 486 U.S. at 461; Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164, 172–73 (1972).

[141] *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 725 (13th ed. 1997).

[142] *See Weber*, 406 U.S. at 175.

[143] *See* 391 U.S. 68, 69–70 (1968).

[144] *See id.* at 69, 72.

[145] *See id.* at 69–70.

[146] *See id.* at 70.

[147] *See id.* at 70, 72.

[148] *See Levy*, 391 U.S. at 71. This test is whether the discrimination against this class of children was rationally related to a legitimate state purpose. *See id.*

[149] *See id.* at 71–72; Nayo, *supra* note 14, at 73.

In striking down the statute, the Court noted the importance of the intimate, familial relationship between a child and his own mother,[150] and reasoned that the wrong inflicted on the mother had no relation to the illegitimacy of the children.[151] Thus, the Court held that denying illegitimate children the right to recover for the wrongful death of a parent was not substantially related to the state's interest in discouraging children born out of wedlock.[152] The Court, in holding the wrongful death statute unconstitutional under the Equal Protection Clause, thus laid the groundwork for treating discrimination against illegitimate children as unconstitutional unless substantially related to an important government interest.[153]

Following *Levy*, the Court, in 1972, applied an intermediate scrutiny test and struck down a worker's compensation statute that discriminated against unacknowledged illegitimate children in *Weber v. Aetna Casualty & Surety Co.*[154] The Louisiana worker's compensation law did not recognize illegitimate children who were not legally acknowledged by their deceased parent, but provided worker's compensation benefits to acknowledged children.[155] Thus the statute functioned to treat unacknowledged illegitimate children as a class with lesser status than the legitimate children of the same parent.[156] As a result, four legitimate children were awarded the maximum allowable compensation for their father's death, while the two illegitimate children, from the same father, received nothing.[157]

The Court in *Weber* found that while the worker's compensation statute was enacted in part to protect and promote "legitimate family relationships,"[158] such a statute would not deter illicit relations or the conception of illegitimate children.[159] The Court reasoned that the

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[150] *See Levy*, 391 U.S. at 71.

[151] *See id.* at 72.

[152] *See id.*

[153] *See id.*

[154] *See* 406 U.S. at 175–76.

[155] *See id.* at 165–66.

[156] *See id.* at 164–66.

[157] *See id.* at 165. In this case, the Court clearly acknowledged the stricter scrutiny: "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *Id.* at 172.

[158] *See Weber*, 406 U.S. at 173.

[159] *See id.* The Court in *Weber* noted that the father of the illegitimate children was unable to legitimize them because acknowledgement required him to be married to their mother; however, he was married to another women. *See id.* at 171 n.9. Thus, there was nothing the parent could do to change the childrens' status. *See id.*

statute unjustly burdened a child who was not responsible for the circumstances of his birth and stated that "when [a] state['s] statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny."[160] The Court concluded that penalizing the illegitimate child was an ineffectual—as well as unjust–way of deterring the parent.[161] Thus, the Court held the Louisiana worker's compensation statute's denial of rights to illegitimate children was in violation of the Equal Protection Clause, as the classification of illegitimate children bore no *significant* relationship to any legitimate state interest.[162]

The Court continued to recognize classifications of illegitimate children as quasi-suspect in its 1977 decision, *Trimble v. Gordon*.[163] In *Trimble,* the United States Supreme Court struck down a probate statute, holding that a government classification based on illegitimacy must bear more than a mere rational relationship to a legitimate state purpose.[164] In *Trimble,* an illegitimate daughter was denied intestate succession from her father after his death, based on her illegitimacy.[165] While children born out of wedlock were only able to inherit from their birth mother under the intestate laws of Illinois, children born in wedlock could inherit by intestate succession from both parents.[166] Applying an intermediate scrutiny test, the Court found that the State's purported interest in promoting legitimate family relationships was not significantly related to the sanctions imposed on the children born of illegitimate relationships.[167] The Court asserted that in a case concerning children's rights, the Equal Protection Clause requires *more* than the "mere incantation of a proper state purpose."[168] The Court further reasoned that a State should not attempt to influence actions of adults by punishing their children.[169] Thus, because the State's interest in promoting legitimate family arrange-

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[160] *See Weber*, 406 U.S. at 172, 175.

[161] *See id.* at 175.

[162] *See id.* at 176.

[163] 430 U.S. 762, 767 (1977).

[164] *See id.* at 776. The Court reasoned that although classifications based on illegitimacy do not require "our most exacting scrutiny," the scrutiny to such classifications "is not a toothless one." *Id.* at 767.

[165] *See Trimble*, 430 U.S. at 763–65.

[166] *See id.* at 764–65.

[167] *See id.* at 770, 776.

[168] *See id.* at 769.

[169] *See id.*

ments failed to justify the unequal treatment of illegitimate children, the Court found the probate statute unconstitutional.[170]

Finally, in 1988 the United States Supreme Court explicitly held that an intermediate level of scrutiny was appropriate for classifications of illegitimate children, in *Clark v. Jeter*.[171] In *Clark*, an illegitimate child was prohibited from establishing her father's paternity for support ten years after her birth, because of Pennsylvania's six-year statute of limitations for paternity actions.[172] The petitioner raised an equal protection challenge because Pennsylvania did not impose a time limit on the right of a legitimate child to sue for support.[173] The Court acknowledged that a heightened scrutiny analysis was appropriate for classifications of illegitimate children, and declared that the time limitation must be substantially related to the State's interest in avoiding the litigation of stale claims.[174] The Court found that the six-year time limit was unreasonable, in light of the fact that increasingly sophisticated scientific tests are available to establish paternity regardless of the child's age.[175] Engaging in heightened scrutiny, the Court held that the statutory classification of illegitimate children was not substantially related to an important state objective, and thus was unconstitutional.[176]

III. Children of Homosexual Parents Are Denied Essential Rights When Second-Parent Adoptions Are Prohibited

While most court decisions regarding second-parent adoptions focus on the rights of the adopting parents, the courts often fail to address the rights and protections being denied children when second-parent adoptions are prohibited.[177] Legal recognition of both homosexual parents of a child affects not only a sense of family stability and social acceptance, but also provides significant legal rights and

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[170] *See Trimble*, 430 U.S. at 770, 775–76.

[171] *See* 486 U.S. at 461.

[172] *See id.* at 457–58.

[173] *See id.* at 458.

[174] *See id.* at 461.

[175] *See id.* at 463–65. The Court also explained that six years may be unreasonable because the mother may be unwilling to file a paternity action on behalf of her child because of a relationship with the natural father, the emotional strain of having an illegitimate child or from the desire to avoid community or family disapproval. *See Clark*, 486 U.S. at 463. Further, financial difficulties are likely to increase after the six-year limitation as a child matures and incurs expenses for clothing, school, and medical care. *See id.* at 464.

[176] *See id.* at 465.

[177] *See* Glennon, *supra* note 7, at 280, 281.

financial securities for the child.[178] As family status in all but one state[179] is typically defined by marriage, the children of homosexual parents in all other states where homosexual partners are legally barred from marrying- are denied many benefits and rights that children of heterosexual parents receive under the law.[180] The financial benefits denied include rights under intestacy laws, support claims, health insurance proceeds and social security benefits in case of a parent's disability or death.[181] Without legal recognition of the adoptive parent, the child's emotional relationship with the second-parent also may lack the security of a heterosexual parent-child relationship.[182] If the homosexual parents separate, the unrecognized parent has neither support obligations nor custody and/or visitation rights.[183] Thus, upon separation of the parents, the child could be denied any further contact with a second parent with whom they have developed a psychological parent-child relation.[184] Furthermore, in the event of the primary parent's death, it may be difficult for the child to remain with, or even maintain any contact with, the other parent if the law does not recognize the family relationship.[185] This often results in traumatic upheaval and disruption for the child who has lost one parent and is faced with the prospect of being taken away from the only other person they trust as a parent.[186]

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[178] *See generally id.* at 281; Julia Frost Davies, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second-Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1074–77 (1995) (explaining that children of homosexual parents are given a legal guarantee of support, inheritance, health benefits and other legal rights from only one parent, while children of heterosexual unions are guaranteed that these obligations will be imposed for their benefit on two parents).

[179] *See* 2000 Vt. Acts & Resolves 91 (H. 847).

[180] *See, e.g.*, Adoption of Tammy, 619 N.E.2d 315, 320–21 (Mass. 1993); Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993).

[181] *See* Epstein & Mukherjee, *supra* note 18, at 809–10. Children who are born to heterosexual parents are not denied these benefits because courts recognize a child to have a mother and father even if the parents choose not to marry. *See id.*

[182] *See generally* Polikoff, *supra* note 5, at 523–27 (noting that providing stability in the home and in the relationship between the child and both parents protects the future of the child and thus is in the child's best interests).

[183] *See Adoption of Tammy*, 619 N.E.2d at 320–21; Polikoff, *supra* note 5, at 533–41.

[184] *See* Polikoff, *supra* note 5, at 534–38, 542.

[185] *See id.* at 527–33. In her article, Polikoff discussed three cases in which after the death of the biological mother, the surviving non-biological mother was faced with custody claims made by a third party related to the biological mother. *See id.* While the surviving lesbian mother ultimately prevailed, Polikoff points out that had she received legal parental status she would have had automatic custody, which could have prevented the children from the trauma of being the subject of litigation. *See id.* at 527.

[186] *See id.* at 527.

IV. Courts' Refusal to Grant Children of Homosexual Parents Legal Protections Violates the Equal Protection Clause

Children of homosexual parents are denied the legal benefits accorded by law to children of heterosexual parents.[187] The Supreme Court, however, has protected illegitimate children from discrimination based on the status of their birth, reasoning that these children are not responsible for their birth and are powerless to alter their status.[188] Courts reviewing denials of second-parent adoption to homosexual parents should apply the intermediate scrutiny employed by the Supreme Court to strike down laws that discriminate against illegitimate children.[189] Children born to homosexual parents are analogous to children born out of wedlock. These children—like illegitimate children—are not responsible for the circumstances of their birth and have no control over their parents' marital status or conduct.[190] Furthermore, because homosexual parents are unable to marry legally, children born to homosexual parents are born illegitimate.[191]

The children of homosexual parents are denied protections of legal recognition of the parent-child relationship based on their parent's personal characteristics.[192] Both the courts that have refused to permit second-parent adoptions and the state statutes that expressly prohibit homosexuals from adopting base such decisions on the sexual orientation of the parent.[193] The child of homosexual parents, however, shoulders the burden of such decisions.[194]

Since the children of homosexual couple's interests are undoubtedly implicated by the denial of second-parent adoptions,[195]

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[187] *See generally* Adoption of T.K.J. and K.A.K., 931 P.2d 448, 492 (Colo. Ct. App. 1996); Adoption of Jane Doe, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998); Angel Lace M. v. Terry M., 516 N.W.2d 678, 684–85 (Wis. 1994).

[188] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1971).

[189] *See Clark*, 486 U.S. at 461.

[190] *See* Trimble v. Gordon, 430 U.S. 762, 770 (1977).

[191] Children born to homosexual parents fall within the definition of an illegitimate child. Black's Law Dictionary 747 (6th ed. 1990). An illegitimate child is "A child who is born at a time when his parents, though alive, are not married to each other."

[192] *See Adoption of Jane Doe*, 719 N.E.2d at 1073; *Angel Lace*, 516 N.W.2d at 682.

[193] *See* Utah Code Ann. § 78–30–9 (2000); Gina Holland, *Musgrove Signs Gay Adoption Ban; Court Battle is Expected*, The Commercial Appeal (Utah), May 4, 2000 at DS6; *see also In re* Opinion of the Justices, 530 A.2d 21, 24–25 (N.H. 1987).

[194] *See* Glennon, *supra* note 7, at 257–59.

[195] *See infra* notes 177–186 and accompanying text.

they become a burdened class as compared to children born to heterosexual families.[196] The only difference between these two classes of children is the sexual orientation of their parents.[197] Therefore, the denial to children of homosexual parents the legal rights that are accorded to children of heterosexual parents is a discriminatory classification. Such a classification—based on a child's being born to homosexual parents—should be subject to a more heightened scrutiny, because the rights involve an intimate, familial relationship between a child and a parent.[198] These classifications of innocent children who are in no way responsible for the status of their birth approach sensitive and personal fundamental rights for which the Court applies a more exacting scrutiny.[199]

V. Denials of Second-Parent Adoptions are not Substantially Related to a Legitimate State Interest

Much of the reasoning by courts prohibiting second-parent adoptions is based on the state's interest in protecting the traditional "unitary family"[200] or to promote the child's best interests.[201] The state's interest in maintaining traditional unitary families burdens children because they are not responsible for the status of their birth. Moreover, promoting unitary families is not a legitimate state interest. Further, while the courts purport to be concerned with the best interests of the child, the decisions preventing second-parent adoptions may, in fact, have the opposite effect.[202]

A. *Protecting the Traditional, Unitary Family is Not a Legitimate State Interest*

Courts that have failed to permit second-parent adoptions often do so under a strict interpretation of their state's adoption statutes.[203] These courts interpret the state adoption statutes to permit second-

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[196] *See Weber*, 406 U.S. at 175.

[197] *See generally* Davies, *supra* note 178, at 1075–78.

[198] *See id* at 176; Levy v. Louisiana, 391 U.S. 68, 72 (1968).

[199] *See Weber*, 406 U.S. at 172.

[200] *See* Angel Lace, 516 N.W.2d 678, 686 (Wis. 1991).

[201] *See* Adoption of Tammy, 619 N.E.2d 315, 318 (Mass. 1993); Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1273 (Vt. 1993).

[202] *See, e.g.*, *Adoption of Tammy*, 619 N.E.2d at 320; Adoption of a Child by J.M.G., 632 A.2d 550, 551–52, 554–55 (N.J. Super. Ct. Ch. Div. 1993); *Adoption of B.L.V.B.*, 628 A.2d at 1275–76.

[203] *See Angel Lace*, 516 N.W.2d at 681.

parent adoption only when the biological parents of the children terminate all of their legal parental rights—as in the context of step-parent adoptions.[204] Courts, such as the Wisconsin Supreme Court in *Angel Lace,* reason that strict interpretation of the statute is necessary to support the state's interest in protecting the traditional family unit.[205] Under this interpretation, the state permits adoption without terminating parental rights only when the parties are married, thus encouraging marital commitments and purportedly discouraging formation of families out of wedlock.[206] As a result of such strict constructions, courts are in effect punishing the child of homosexual parents in an effort to deter nonmarital—and thus homosexual—relations. This treatment of children is analogous to the situation in *Weber,* where the Court found that a statute enacted to promote legitimate family relations was unconstitutional because it unjustly burdened the child who was not responsible for the circumstances of his or her birth.[207] Children born to homosexual parents are likewise not responsible for the circumstances of their birth, and penalizing them is an equally unjust way of deterring the parent's behavior.[208]

Punishing children for being born into an untraditional family is contrary to the basic concept of our justice system—legal burdens should bear some relationship to individual wrongdoing.[209] The Court in *Levy* declared unconstitutional a statute where the intent of the statute had no relation to the illegitimacy of the children and held that it is invidious to discriminate against children when "no action, conduct, or demeanor of theirs is possibly relevant" to the interest trying to be protected.[210] Similarly, in *Trimble,* the Court found that the state's interest in promoting legitimate family relationships was not substantially related to the sanctions imposed on the blameless child born out of wedlock and thus held the statute unconstitutional.[211] Children have no choice with respect to the family arrangement in which they are born—including children born to homosexual parents—and therefore, the state cannot attempt to influence actions of adults by punishing their children.[212]

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[204] *See id.*
[205] *See id.* at 686.
[206] *See id.* at 682–83.
[207] *See Weber,* 406 U.S. at 175.
[208] *See id.* at 173; *Adoption of B.L.V.B.*, 628 A.2d at 1275–76.
[209] *See Levy,* 391 U.S. at 72.
[210] *See id.*
[211] *See* Trimble v. Gordon, 430 U.S. 762, 768, 770 (1977).
[212] *See id.* at 770 (citation omitted).

Denying second-parent adoptions under the guise of trying to protect "traditional" families is not only unjust because it penalizes children for circumstances beyond their control, it also is unrealistic and ineffectual because such denials will not change the fact that such family structures exist. As the New Jersey court in *Adoption of a Child by J.M.G.* reasoned, recognizing—or not recognizing—the parent-child relation does not alter the family structure.[213] The child-parent relation with both homosexual partners will continue to exist regardless of the judiciary's decision to legally protect the relation.[214] Since children have no control in the circumstances of their birth, denying them legal protections will not discourage the creation of nontraditional families.[215] Thus, denial of second-parent adoptions does not further the goal of protecting traditional, unitary families.[216] Because the state interest cannot be furthered by discriminatory treatment of children of homosexual parents, the classification is not significantly related to a legitimate state interest.[217]

Finally, protecting traditional unitary families may no longer be a legitimate state interest. Many thriving families today do not conform to the one-mother/one-father model.[218] The state's interest in preserving traditional families is becoming more strained and artificial. Nontraditional unitary families are becoming as prevalent and important as traditional families, and the state should not protect one family structure above others.[219] The courts' refusal to recognize new family relationships is not founded on a legitimate state interest and under an intermediate scrutiny, the discriminatory classifications of children of homosexual parents, as a class, are unconstitutional.[220]

B. *Promoting the Best Interests of the Child is not Accomplished by Denial of Second-Parent Adoptions*

Courts that strike second-parent adoption petitions based on the premise of promoting the child's best interests are in fact denying the child many benefits and protections created by a legal parent-child

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[213] *See* 632 A.2d at 551–52.

[214] *See* Polikoff, *supra* note 5, at 543–44, 572.

[215] *See id.*

[216] *See id.* at 551.

[217] *See B.L.V.B.*, 628 A.2d at 1275.

[218] *See* Polikoff, *supra* note 5, at 573.

[219] *See id.*; *see also Adoption of B.L.V.B.*, 628 A.2d at 1276.

[220] *See id.*

relation.[221] These courts often rely upon generalized beliefs of gay and lesbian parenting rather than individualized determinations of the best interests of children in cases that come before them.[222] The interest in promoting the welfare of the child is therefore not furthered by denying second-parent adoptions, and thus, such decisions are not significantly related to a legitimate state interest.[223]

Court decisions and legislative enactments that deny second-parent adoptions are based on myths about homosexuality and subjective morality judgments.[224] For example, in *Opinion of the Justices,* the New Hampshire Supreme Court upheld an irrebutable statutory presumption that homosexuals are unfit to serve as adoptive parents based on the assumption that homosexuals are improper role models for children.[225] Although the law has since been overturned by the New Hampshire legislature,[226] the New Hampshire court reasoned that prohibiting homosexual adoptions promoted children's welfare by preventing the confusion and social complexities that exposure to a homosexual lifestyle could produce.[227] Today, adoption in New Hampshire is based on individual fitness, not prejudicial assumptions. The New Hampshire legislature and governor recognized that fear and ignorance was the foundation of the law prohibiting adoption by homosexuals.[228] Supporters of the repeal admitted that "[b]ecause of the ignorance, discrimination, and prejudice of [the New Hampshire] [l]egislature, the . . . children of New Hampshire have suffered."[229]

The findings published in the Utah statute prohibiting unmarried cohabitating couples from adopting similarly make the assumption that it is not in a child's best interest to live with unmarried parents, considering the moral climate of the situation.[230] The legislature provides generalized, unsupported conclusions that parents who are cohabitating and unmarried are not fit to raise a child in a healthy, safe environment.[231] The Florida District Court of Appeal in *Cox I*

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[221] *Adoption of Tammy,* 619 N.E.2d at 318, 320; *Adoption by J.M.G.,* 632 A.2d at 551, 554–55; *Adoption of B.L.V.B.,* 628 A.2d at 1275, 1276

[222] *See Cox I,* 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993); *In re* Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987); *see also* Polikoff, *supra* note 5, at 572.

[223] *See Cox I,* 627 So. 2d at 1220.

[224] *See* UTAH CODE ANN. § 78–30–9 (2000); *Opinion of the Justices,* 530 A.2d at 23, 25.

[225] *See Opinion of the Justices,* 530 A.2d at 23, 25.

[226] *See* N.H. REV. STAT. ANN. § 170-B:4 (2000).

[227] *See Opinion of the Justices,* 530 A.2d at 23–24.

[228] *See N.H. Set to Repeal Ban on Gay Adoptions,* THE RECORD (N.H.), Apr. 23, 1999, at B2.

[229] *See id.* (quoting Sen. Katie Wheeler).

[230] *See* UTAH CODE ANN. § 78–30–9 (2000).

[231] *See* UTAH CODE ANN. § 78–30–9 (2000).

likewise declared that adoptions by homosexuals were not in the best interests of the child.[232] Rather than showing any evidence supporting its assumption, the *Cox* court supported such a conclusion by pointing out that there was no reliable evidence to counter this conclusion.[233] Thus, without any evidence that homosexual parents are unfit or may detrimentally impact their children, the court upheld a statute denying homosexual's adoption based on stereotypes and an unsupported correlation between sexual orientation and the ability to parent.[234]

In contrast to the sweeping, unsupported conclusions of these state courts and legislatures, it is often in the best interest of the child to have the parental relationships with both parents legally recognized.[235] First, the source of homosexuality is still inadequately understood.[236] In their generalizations about homosexuals' parenting ability, neither the Florida District Court of Appeal nor the Utah or Mississippi legislatures were able to point to conclusive evidence supporting a conclusion that homosexual parents were unfit to be parents.[237] Second, regardless of whether a second-parent adoption is permitted, a court's ruling will not deter the formation of families that are comprised of homosexual parents and their children.[238] Reproductive technology and the existence of homosexual couples will not disappear but rather will continue to develop with increasing numbers of children living in these nontraditional families.[239] Thus, courts' denial of second-parent adoptions only frustrates the child's interests and deny children the many legal protections and benefits that are accorded to heterosexual parent-child relationships.[240]

Protection of a child's relationship with both parents—whether heterosexual or homosexual—*is* in the child's interest.[241] The Massachusetts court in *Adoption of Tammy* recognized this, noting that deny-

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[232] *See Cox I*, 627 So.2d at 1220.

[233] *See id.*

[234] *See* Markey, *supra* note 2, at 745–46.

[235] *See Adoption of Tammy*, 619 N.E.2d at 318, 320; *Adoption by J.M.G.*, 632 A.2d at 551, 554–55; *Adoption of B.L.V.B.*, 628 A.2d at 1275, 1276; *see also* Glennon, *supra* note 7, at 258–59, 277–79.

[236] *See Opinion of the Justices*, 530 A.2d at 25.

[237] *See* UTAH CODE ANN. § 78–30–9 (2000); Department of Health and Rehabilitative Servs. v. Cox, 627 So.2d 1210, 1213 (Fla. Dist. Ct. App. 1993); Carlos A. Ball, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 279–89 (1998); Glennon, *supra* note 7, at 276–77.

[238] *See Adoption by J.M.G.*, 632 A.2d at 551–52; *Adoption of B.L.V.B.*, 628 A.2d at 1276.

[239] *See Adoption of B.L.V.B.*, 628 A.2d at 1276.

[240] *See infra* notes 33–47 and accompanying text.

[241] *See Adoption of Tammy*, 619 N.E.2d at 320–21; *Adoption of B.L.V.B.*, 628 A.2d at 1275.

ing the second-parent adoption would deprive the daughter of a lesbian couple the right to inherit from her non-natural mother's family trust fund—as the inheritance could only be passed to the mother's legal issue.[242] The court permitted the second-parent adoption, stating that Tammy's best interest is served by ensuring that the child's relationship with both mothers is protected.[243] In addition to the potential inheritance, the court also noted that it would be best for the child to have two parents legally obligated to support her, to provide social security and health insurance benefits and for the child to have the filial ties to both women preserved in the event of separation or of the biological mother's death.[244] The court acknowledged that recognizing a parent-child relation is in the child's best interests because of the rights and protections it affords the child.[245]

In other similar state cases permitting second-parent adoptions, courts have found that legal recognition of the parent-child relationship was essential to promote the welfare of the child.[246] After noting the financial and emotional benefits a child receives by a legal relationship with both homosexual parents, the Vermont court in *B.L.V.B.* held that denying legal protection of the parent-child relationship is, as a matter of law, inconsistent with the child's best interests.[247] Moreover, the court recognized that to disallow a legally recognized relationship with the second parent serves no legitimate state interest and noted that the court's paramount concern was the effect of the law on the *reality* of children's lives.[248] Similarly, the New Jersey court in *Adoption by J.M.G.*, held that the second-parent adoption was in the child's best interests because it provided the child critical legal rights and protections for her financial safety, as well as physical and emotional well being.[249] The court noted the protections accorded to the child by the legally recognized parent-child relationship and stated that courts cannot "continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment . . . children should inhabit."[250]

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[242] *See Adoption of Tammy*, 619 N.E.2d at 320.

[243] *See id.* at 318, 320–21, 322.

[244] *See id.* at 320–21.

[245] *See id.*

[246] *Adoption of Tammy*, 619 N.E.2d at 318, 320; *Adoption by J.M.G.*, 632 A.2d at 551, 554–55; *Adoption of B.L.V.B.*, 628 A.2d at 1275, 1276.

[247] *See Adoption of B.L.V.B.*, 628 A.2d at 1276.

[248] *See id.* at 1275–76.

[249] *See Adoption by J.M.G.*, 632 A.2d at 551–52.

[250] *See id.* at 554–55.

In almost all cases, children benefit from legal recognition of the relationship they share with their second parent.[251] Courts that continue to deny children a legal parent-child relationship with both homosexual parents are denying the children the benefits of such a relationship and thus precluding what may be in their emotional and economic best interest. Thus, even under the least strict scrutiny—rational review—the state's denying a child the legal protections of the parent-child relationship is not rationally related to the state's interest in promoting the best interest of the child.[252]

VI. Beyond Second-Parent Adoptions: Positive Developments

While second-parent adoptions are a positive step toward acknowledging alternative family situations, progressive steps have been taken to legally recognize families that are not made up of the traditional one-mother/one-father model.[253] The state of Vermont took the historic step in recognizing the rights of same-sex couples.[254] The Act Relating to Civil Unions provides same-sex families virtually the same state rights accorded to heterosexual families.[255] While the law does not extend full equality to the same-sex couple through the freedom to marry, the civil union law provides protections in inheritance, property division, child custody and support, family leave, and state tax benefits.[256]

Under the civil unions law, a child born to a couple in a civil union is given equal state benefits and protections as a child born to a heterosexual parent.[257] As a result of this new law, children whose homosexual parents enter into a civil union will have the emotional and financial security that have been denied to them unless they were legally adopted by their parent's partner. By being accorded the same rights and protections, these children will no longer be discriminated against because of the status of their birth.[258] Children who are born

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[251] *See, e.g.*, *Adoption of Tammy*, 619 N.E.2d at 318, 320; *Adoption by J.M.G.*, 632 A.2d at 554–55; *Adoption of B.L.V.B.*, 628 A.2d at 1275, 1276; Glennon, *supra* note 7, at 257–59. In the rare cases where children will not benefit from the parent-child relation, the courts should still employ the "best interests" standard and make its determination about the family structure accordingly.

[252] *See* Glennon, *supra* note 7, at 258.

[253] *See* 2000 Vt. Acts & Resolves 91 (H. 847).

[254] *See id.*

[255] *See* Vt. Stat. Ann. tit. 15 § 1204 (2000).

[256] *See id.*

[257] *See id.*

[258] *See id; see also supra* notes 33–47, 240, 246 and accompanying text.

to same-sex parents in a civil union are legitimate and will not be treated differently merely because of the sexual orientation of their parents.[259] Therefore, the enactment of the Civil Union law is a positive step toward ending the disparate treatment of children born to same-sex couples in Vermont.

While this unprecedented law has many unsettled questions relating to whether other states will recognize Vermont's civil unions protections, it is a positive step in protecting same-sex families.[260] Because of the uncertainty surrounding recognition of civil unions in other states, however, it is still important for second parent adoptions to be permitted as an option for same-sex couples who have children. Until all states accord the same rights and benefits to same-sex couples as heterosexual couples, second-parent adoptions remain critical to protect the relationship between same-sex parents and their children.[261]

CONCLUSION

Despite the fact that children are not responsible for their birth, children born to homosexual parents are being punished because of the legal system's failure to recognize the legitimacy of the relationship between homosexual parents and their children. Courts' refusal to recognize the existence of these family relations directly harms the innocent children born to these families, denying them a plethora of legal rights guaranteed to other children. A strong argument can be made that punishing children for the actions of the parents is unjust and unfair treatment, treatment that is violative of the Equal Protection Clause.

The rationale behind court decisions and legislative enactments denying second-parent adoptions often stems from a disapproval of homosexual parents' lifestyle. It is not the role of courts and legislature, however, to make laws based upon the approval or disapproval of the relationships that seek legal recognition. Whether or not the members of the judiciary and legislature approve will not change the reality that children are being born to homosexual parents. As reproductive technologies and alternative families continue to develop, the legal definition of family must become more accepting of the fact that

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[259] *See* VT. STAT. ANN. tit. 15 §§ 1201, 1204 (2000).

[260] *See A Historic Victory*, *supra* note 65, at 4–6.

[261] *See id.* at 5.

many different family structures may provide the love, security and stable environment essential for children.

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